Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTINA BREWER, Personal Representative for the Estate of Richard Brewer,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL APPENDIX FOR PETITION FOR A WRIT OF CERTIORARI

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FILED JUN 25 1998
US District Court for the
Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 97-00902 MJJ

CHRISTINA BREWER, Personal Representative for the Estate of Richard Brewer,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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1. INTRODUCTION

This is a wrongful death action brought under federal admiralty jurisdiction pursuant to the Public Vessels Act, 46 U.S.C. §§ 781-790, and the Suits in Admiralty Act, 46 U.S.C. §§ 741-752, against the United States of America. Plaintiff Christina Brewer alleges that Coast Guard is responsible for the death of her husband, Richard Brewer. Having considered the parties' briefs, exhibits, declarations, and arguments of counsel, the Court hereby **GRANTS** defendant's motion for summary judgment.

II. BACKGROUND

On October 29, 1994, Richard Brewer ("Brewer") and David Hoover ("Hoover"), students studying Russian at the Defense Language Institute in Monterey, California, went fishing on Monterey Bay in Brewer's fishing boat called the Foxtrot. The Foxtrot was a 19-foot long boat, equipped with an outboard motor and a radio located in its small cabin. The boat was equipped with safety gear, including an air horn and life jackets, but did not have an anchor.

Brewer and Hoover launched from the Coast Guard pier sometime between 11:30 and 11:45 a.m. Following a short stop about a half a mile from shore, they began to head further out. Noticing that Foxtrot was moving unusually slow, they shut off the engine to examine the problem. After removing some kelp from the motor blade, they attempted to restart the engine. The engine would not restart. They tried a few remedial measures, which were unsuccessful.[1]

Hoover got on the radio, and broadcasted the message, "Is anyone out there?", over emergency channel 16 on the radio. Brandon Hansen ("Hansen"),[2] a telecommunications

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[1] According to Hoover's deposition, Brewer immediately became scared, because Brewer got seasick. He also feared that they would be unable to get a tow, that they would drift into the beach and that they would get swamped in the breakers. They tried to get help from other boats in the area, including the Fish and Game Wardens, by waving their arms and blasting the air horn, but no one responded.

[2] Hansen was under the supervision of Gary Walker ("Walker"), the officer of the Day ("OOD") and the Search and Rescue (SAR) controller at Monterey on October 29, 1994.

specialist with the Coast Guard Monterey unit, responded. At this point, Brewer took over the radio transmission on the Foxtrot.

Brewer first told the Coast Guard that their motor had gone out, and they required assistance. Pursuant to National Coast Guard procedures, Hansen asked for the location of the boat and the number of persons in the boat. He told Hansen that they were halfway between the Monterey Hotel and the Wharf, that they were in a 19-foot red and white marlin and that there were two people in the boat.

Hansen then asked Brewer if he was in any immediate danger. Brewer said he was not.[3] Hansen also asked them to don their life jackets and to anchor the vessel. Brewer responded that he could not do this because the anchor was gone, but that they had donned their life jackets. At this point, approximately three and a half minutes had elapsed since radio contact was established.

During the initial conversation between Hansen and Brewer, Walker instructed Dennis McGraw ("McGraw"), the coxswain of Coast Guard Vessel 367, to conduct a routine law enforcement patrol of the bay. Walker also informed McGraw that the Foxtrot was disabled and might need some assistance. More specifically, Walker informed McGraw that the Foxtrot was drifting toward shore as it did not have an anchor, that the wind and seas were calm, and that the Foxtrot did not appear to be in any immediate distress.

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[3] This was his first response, but Hansen did not hear him. When Hansen repeated the question of whether he was in any immediate danger, he responded, "[n]ot right at the minute."

Therefore, McGraw was not given specific instructions to assist the Foxtrot because at this point, the situation was not considered to be an emergency.

After Brewer told Hansen that the anchor was gone and they had donned their life jackets, Hansen asked him to switch radio channels. Once communication was reestablished on a different channel, Hansen confirmed with Brewer that he was having engine problems. Hansen then asked him about the on-scene weather, visibility, wind direction and seas direction.[4] Brewer responded that the wind was blowing the Foxtrot towards the seashore. Hansen then asked how far the Foxtrot was from shore. At this point, communications were blocked off several times because of another boat's audio transmission.

Knowing now that the Foxtrot was headed toward shore, Walker, about six minutes and forty seconds into the transmission ("minute 6:40"), upgraded the Foxtrot's situation from an MARB to a distress case requiring an Urgent Marine Information Broadcast ("UMIB"), an emergency message to all boaters in the area. He contacted McGraw again, and instructed him to go pick up Brewer and Hoover. Consequently, McGraw started preparing Coast Guard Vessel 367 for departure at minute 6:40.

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[4] Hansen treated this situation as a non-distress case, and thus, prepared a Marine Assistant Request Broadcast ("MARB"). A MARB is a communication to boaters in the area requesting voluntary assistance to aid a boat in non-distress situations. It is used to invite persons, such as commercial providers or Good Samaritans, interested in responding if they so desire.

Approximately seven minutes and forty seconds into the transmission ("minute 7:40"), Hansen informed Brewer that the Coast Guard had a vessel on route to his position. He then asked Brewer if anyone had any medical problems. Brewer said no, but within a few minutes, indicated that the waves were breaking right in front of the boat. Hansen then asked more questions about the exact location of the boat, and requested descriptions of those people on board.

After he got their descriptions, Hansen broadcasted a UMIB about twelve minutes and four seconds into the transmission ("minute 12:04"). He described the Foxtrot and its general location and indicated that the Foxtrot was disabled and drifting toward shore in the Del Monte Beach area. He also asked all vessels to maintain a sharp lookout for the Foxtrot, to report all sightings of the boat, and to assist if possible.

About thirteen minutes and ten seconds into the transmission, McGraw's vessel left the Coast Guard dock. After a few minutes of communication with other Coast Guard vessels about the Foxtrot, Hansen attempted to resume communications with Brewer, but was unable to reestablish contact. About seventeen minutes and thirty-two seconds into the transmission, McGraw contacted Hansen, telling him that the Foxtrot had capsized on the beach.

When the boat capsized, Hoover was thrown off the boat, but Brewer was trapped underneath in the small cabin. Hoover and a group of people were unable to turn the boat over. Before Hoover was able to pull him out of the cabin, Brewer drowned.

Meanwhile, Coast Guard Mobile 2 asked Hansen whether it should respond. Hansen advised them that Monterey Fire Department was already headed to the scene. Shortly thereafter, a Junior Officer of the Day ("JOOD") from the Coast Guard arrived on the scene to assist. The JOOD informed Hansen that Coast Guard Mobile 2 arrived on the scene and that the ambulance had pulled up to administer medical treatment.

III. LEGAL STANDARD

To withstand a motion for summary judgment, the opposing party must set forth specific facts showing that there is a genuine issue of material fact in dispute. See Fed. R. Civ. P. 56(e). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, "the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

In opposing summary judgment, plaintiff is not entitled to rely on the allegations of his complaint. She "must produce at least some 'significant probative evidence tending to support the complaint.'" T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n., 809 F.2d 626, 630 (9th Cir. 1987)(quoting First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 290 (1968)).

The Court does not make credibility determinations with respect to evidence offered, and is required to draw all inferences in the light most favorable to the non-moving party. See T.W. Elec. Serv., Inc., 809 F.2d at 630-31 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). Summary judgment is therefore not appropriate "where contradictory inferences may reasonably be drawn from undisputed evidentiary facts . . ." Hollingsworth Solderless Terminal Co. v. Turley, 622 F.2d 1324, 1335 (9th Cir. 1980).

IV. DISCUSSION

A. Applicable Law

Admiralty law, and the law of rescue attempts in particular, has a number of unique legal standards which apply in any analysis. Under the Public Vessels Act, a party has no greater right against the United States than she would have against a private person under similar circumstances. Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 228 (1945). A private party has no affirmative duty to rescue a vessel or person in distress. Lacey v. United States, 98 F. Supp. 219, 229 (D. Mass. 1951). Likewise, the Coast Guard has no affirmative duty to render aid to a vessel or person in distress. Frank v. United States, 250 F.2d 178, 180 (3rd Cir. 1957), cert. denied, 356 U.S. 962 (1958); Wright v. United States, 700 F. Supp. 490, 494 (N.D. Cal. 1988); Daley v. United States, 499 F. Supp. 1005, 1009 (D. Mass. 1980).

If the Coast Guard responds to a call for assistance, it is not required to provide any particular kind of vessel, or equip its boats in any particular way. Frank, 250 F.2d at 180;

United States v. Sandra & Dennis Fishing Corp., 372 F.2d 189, 197 (1st Cir. 1967), cert denied, 389 U.S. 836 (1967). The Coast Guard is not held to any higher standard of care in its rescue operations than a private person Private Boats v. United States, 352 F. Supp. 44, 48 (E.D. Va. 1972).

In considering plaintiff's arguments, the Court may not second-guess the decisions made by rescue personnel in the midst of the rescue attempt, Wright, 700 F. Supp. at 495; Page v. United States, 105 F. Supp. 99, 102 (E.D. La. 1952), or the decisions of rescue personnel concerning the proper time to begin rescue attempt. McLaughlin v. United States, 671 F. Supp. 72, 75 (D. Me. 1987) (failure of Coast Guard to initiate search and rescue activity not subject to evaluation of a court for reasonableness); Daley, 499 F. Supp. at 1009 (Coast Guard's decision to delay commencement of search not actionable).

A rescue attempt must be considered in the light of the circumstances that faced the rescuers when they acted and not with the wisdom of an "armchair admiral" after the fact. Afran Transport Co. v. S/S Transcolorado, 458 F.2d 164 (5th Cir. 1972); Johnson v. United States, 378 F.2d 732 (9th Cir. 1967). Indeed, "of all the branches of jurisprudence, the admiralty must be the most hospitable to the impulses of man and law to save life and limb and property." Grigsby v. Coastal Marine Service of Texas, Inc., 412 F.2d 1011, 1021 (5th Cir. 1969), cert. denied, 396 U.S. 1033 (1970).

With these unique admiralty rules in mind, a rescuer will be held liable only if: (1) the rescuer's conduct was negligent and that conduct worsened the position of the victim; or (2)

the rescuer's actions, in performing the rescue, constituted reckless and wanton conduct. Berg v. Chevron, 759 F.2d 1425, 1430 (9th Cir. 1985).

B. The First Prong of the Berg Standard

The Court finds that plaintiff fails to meet the first prong of the Berg test. Here, even assuming arguendo that the Coast Guard was negligent in failing to respond more quickly, there is absolutely no evidence that the Coast Guard's conduct worsened the condition of the victim. The Foxtrot would have been swept ashore in any event as a result of the wind and surf conditions and, as importantly, because it did not have an anchor. As such, there is no substantial probative evidence to support any finding that the Coast Guard worsened the victim's situation. Moreover, Plaintiff provided no argument on this issue in her opposition papers and indeed conceded at oral argument that her principle contention is that there is evidence of reckless and wanton conduct. (See Transcript of Hearing, February 24, 1998, p. 7). Therefore, the Court finds that Plaintiff has failed to raise a genuine issue of material fact with respect to the first prong of the Berg test.

C. The Second Prong of the Berg Standard

Defendant also may be held liable if the Coast Guard acted recklessly and wantonly in performing the rescue. Berg, 759 F.2d at 1430. Plaintiff argues that a reasonable trier of fact could find that Defendants alleged slow response after it undertook the rescue amounted to reckless and wanton conduct.

In analyzing this issue, the Court must first determine when the Coast Guard undertook the rescue of the Foxtrot. The question of when a rescue attempt begins is fundamentally a question for the jury, Furka v. Great Lakes Dredge and Dock Co., 755 F.2d 1085, 1088, ("Furka I")(4th Cir.1985). However, it is clear from the record herein that the earliest time the Coast Guard's rescue attempt could have begun is when the Coast Guard decided to send its own resources to rescue Brewer. Based on the record, this occurred at minute 6:40. At this juncture, Walker upgraded the status of the Foxtrot from a regular tow situation to an emergency situation and directed McGraw to go and pick up Brewer and Hoover. McGraw did not leave the dock until about thirteen minutes and ten seconds into the transmission. The question on this motion, then, is whether a reasonable trier of fact could find that the six and one half minutes it took for McGraw to leave the dock constituted reckless and wanton conduct.

The wanton and reckless standard arose at common law in recognition of the fact that one may be driven to acts during a rescue that would not befit a reasonable prudent person. Furka v. Great Lakes Dredge and Dock Company, 824 F.2d 330, 331 (4th Cir. 1987)("Furka II"). Under common law, "reckless and wanton conduct" is often defined as where "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make highly probable that harm would follow, and which is usually accompanied by a conscious indifference to the consequences." W. Page Keeton et al., Prosser & Keeton on the Law of Torts, § 34, at 213 (5th ed. 1984); see, e.g., In Re Exxon Valdez, 1995 WL 527989*1, *10 (D. Alaska 1995)(court instructed jury that

negligence is the failure to use reasonable care, whereas reckless conduct "requires a conscious choice of action, either with knowledge of serious danger to others or with knowledge of facts which would disclose the danger to any reasonable person"); Protectus Alpha Nav. v. N. Pacific Grain Growers, 767 F.2d 1379, 1385 (9th Cir. 1985)(defendant dock owner's conduct of casting away burning vessel in blatant disregard of the safety of the firefighters on scene was reckless). Despite these alternative standards, the essential outlines of reckless and wanton conduct are clear: defendants must have acted intentionally or with conscious disregard for a known or obvious risk of danger.

Here, once Hansen and Walker determined that Brewer was in immediate danger, they initiated a rescue attempt. Walker then ordered McGraw to rescue Brewer and Hoover. According to Walker, he told McGraw that it was an emergency situation and that the Foxtrot was drifting toward shore. However, he also told him that the wind and surf were calm, and did not tell McGraw how far the Foxtrot was from shore. In contrast, McGraw testified that he was never told that Brewer's situation was a distress call. He also testified that he would have responded sooner, had he known that it was an emergency situation. Nevertheless, more that six minutes elapsed between the time McGraw was directed to rescue Brewer and Hoover and when the Coast Guard vessel left the dock.

Defendant, however, has offered essentially uncontradicted evidence that this delay of more than six minutes did not represent any uncommon or unusual amount of time in launching the rescue vessel and certainly did not

represent reckless and wanton conduct. Specifically, the deposition testimony of Walker and McGraw demonstrate that the Coast Guard did not take any action or fail to take any action of an intentional nature or reflective of a conscious disregard of a known or obvious risk.

McGraw testified as follows:

> Q: Okay. Now the note on here, as it says "1214" or "215 UW." UW, what does that mean?
> A: Underway.
>
> Q: Okay. What was going on in that 8 minutes between 1207 and 1215?
> A: Getting the crew assembled, lighting off the boat, briefing the crew.
>
> Q: Okay. Well, you know, how – if you have to get out – if you got an emergency where you got to go someplace in a big hurry, how long can you get underway from the moment somebody says go?
> A: It depends on where the boat crew is. It's a pretty big group, the – the building structure.
>
> Q: Okay. How many people were aboard the vessel with you?
> A: Three

Q: Three. Who are the other three people – who are the other two people?
A: Seaman Martinez

Q: Okay.
A: And Fireman Fisher.

McGraw Depo, 42:3-23

Walker testified as follows:

Q: How long would you expect it to take before the Coast Guard Vessel is underway.
A: Be more specific

Q: Sure. You have got a boat that has got to go pick this man up. How long would you expect from 12--- from the time when you talked to Mr. McGraw, about 12:07, that it would be before Mr. McGraw would be on the water moving toward the Foxtrot?
A: Roughly 5 minutes.

Q: Okay. And what would take 5 minutes?
A: The crew had to be equipped with their weapons. No Coast Guard crew can get underway without their weapons. The crew also has to take time to start up the boat, get the engines going and do their preliminary checks. It does no good if the boat gets out there and breaks down.

Walker Depo, 63:5-22

The above-referenced deposition excerpts provide crucial and essentially unrebutted testimony as to what the Coast Guard did after the call was upgraded to emergency status. McGraw's testimony, while somewhat sparse, reflects that the Coast Guard was attempting to effect a rescue during the crucial 6-8 minute time frame (briefing the crew, lighting the boat, etc.) and is corroborated by Walker's opinion testimony that it would take about 5 minutes for McGraw to get underway after he informed McGraw of the emergency. This crucial evidence, read especially in light of admiralty rules which preclude second-guessing rescue operations and encourages rescuers to undertake rescues, precludes any reasonable inference of reckless or wanton conduct arising from a failure to respond more quickly. Quite simply, there is no evidence that the Coast Guard acted intentionally or with conscious disregard for a known or obvious risk of danger.

The testimony of McGraw and Walker is essentially unrebutted notwithstanding the expert testimony adduced by plaintiff that the Coast Guard should have undertaken rescue measures sooner. Under the relevant case law, the Coast Guard has no duty to effect rescue until it undertakes to do so. On these facts, their duty arose at or about the 6:40 mark. The task on this motion is to assess the Coast Guard's conduct under the Berg standard from this juncture forward.

Since the record evidences that the Coast Guard was undertaking reasonable rescue efforts during the time period after the call was upgraded to emergency status, Plaintiff's argument that defendant did nothing during this crucial time period is severely undermined. While the testimony of McGraw and Walker do not account for the entire 6-8 minutes it took to get underway after the call was upgraded

to emergency status, it takes the defendant's conduct out of the realm of reckless or wanton misconduct. Therefore, Defendant's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

Dated: June 25, 1998.

MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE